

§ 27.09

PLANNING BOARD

Ch. 27

§ 27.09 **Removal of Members**

Appointed or alternate members of a planning board may be removed by the appointing authority, after a public hearing, upon findings of inefficiency, neglect of duty, or malfeasance in office.³⁵ The appointing authority or the planning board must file a statement of the reasons for removal with the municipal clerk.³⁶

The board of selectmen may remove an elected member or an alternate member after a public hearing upon findings of inefficiency, neglect of duty, or malfeasance in office.³⁷ Also, the council, selectmen, or district commissioners may, for similar reasons, remove the members selected by them.³⁸

In order to remove a member for malfeasance in office, the malfeasance must be directly related to the member's official duties. Members cannot be removed for malfeasance for activities which have no connection with their official duties, even if those activities constitute criminal conduct.³⁹

Cross References

Hearings Before Public Officials, *see* Loughlin, 13 New Hampshire Practice: Local Government Law, ch. 16 (1990)

§ 27.10 **Disqualification of Board Members**

Until 1984, there was no special standard for the disqualification of a planning board member. In 1984, in *Winslow v. Town of Holderness Planning Board*⁴⁰ the court applied the juror standard for disqualification, which had applied by statute to zoning boards of adjustment,⁴¹ to planning board members when they were sitting in a judicial or a quasi-judicial capacity. The court cited the 1851 case of *Sanborn v. Fellows*⁴² for the proposition that if a board is bound to notify and hear the parties, and may only decide after weighing and considering such arguments as the parties choose to lay before them, their action is judicial.⁴³ Since planning boards, at least when they are hearing subdivision or site plan review applications, are required by statute to notify all interested parties and to hold public hearings before ruling on such requests, the court

³⁵ RSA 673:13, I.

³⁶ RSA 673:13, III.

³⁷ RSA 673:13, II.

³⁸ RSA 673:13, IV.

³⁹ *Williams v. Dover*, 130 N.H. 527, 543 A.2d 919 (1988) (plaintiff, acting on behalf of his employer, violated Dover regulations by constructing a building without a building permit or site review; in all his dealings with the city, plaintiff represented himself as an agent of his employer and not as a member of the planning board; although planning board had jurisdiction over site review, neither of the acts for which plaintiff was removed related to his official duties and were thus not grounds for removal).

⁴⁰ 125 N.H. 262, 480 A.2d 114 (1984) (planning board member disqualified from sitting on a case and decision of planning board invalidated because of statements planning board member had made at a public hearing on the specific application prior to his appointment to the board).

⁴¹ RSA 673:14.

⁴² 22 N.H. 473, 489 (1851) (proceedings before fence viewers in 1847 in Hampton Falls were invalid because one of the fence viewers was the uncle of one of the parties in interest).

⁴³ 125 N.H. at 266, 480 A.2d at 116.

found that the activities of the planning board could be characterized as judicial or quasi-judicial, at least for the purposes of deciding whether the rights of parties are adequately protected, i.e., whether due process requirements were met.⁴⁴ The court characterized planning board hearings as “quasi-judicial” because such boards need not provide all of the procedural safeguards required in a court of law.⁴⁵

The 1988 session of the New Hampshire Legislature⁴⁶ amended RSA 673:14, not only codifying the *Winslow* decision, but also applying the juror standard to building code boards of appeals and historic district commissions. The legislature provided that a board member cannot sit upon the hearing of any question in which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in an action at law.⁴⁷

The 1988 amendment provided that when uncertainty arises as to whether or not a board member is disqualified under certain circumstances, that board member or another member of the board may request a vote on the question of whether the member should be disqualified.⁴⁸ Any such request and vote must be made prior to or at the commencement of any required public hearing.⁴⁹ This type of vote is advisory and nonbinding, so a board member could nonetheless sit even if other members of the board felt that person disqualified.⁵⁰ It is suggested, however, that a board member staying on the board under such circumstances may not be wise. While persons appearing before a board may request that any board member disqualify him- or herself, only members of a board may request a vote on the disqualification unless otherwise provided by local ordinance or by procedural rule adopted by the board pursuant to RSA 676:1.⁵¹ If a member is disqualified or unable to act in any particular case pending before the board, the chair must designate an alternate to act in his place, as provided in RSA 673:11.⁵²

A planning board member who is an abutter to a proposal for subdivision or site review approval before the planning board is automatically disqualified from sitting on the board, regardless of whether that board member feels he could sit and hear the petition in an unbiased manner.⁵³ If a board member who is disqualified sits as a member of the board when the board is acting in a judicial or quasi-judicial capacity, the decision of the board will be invalidated because it is impossible to eliminate the influence that one member might have on his associates.⁵⁴

⁴⁴ Id. At 267, 480 A.2d at 116.

⁴⁵ Id.

⁴⁶ Laws 1988, ch. 26.

⁴⁷ RSA 673:14, I.

⁴⁸ RSA 673:14, II.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² RSA 673:14, III.

⁵³ *Totty v. Grantham Planning Board*, 120 N.H. 388, 415 A.2d 687 (1980) (because abutters must receive notice and be given an opportunity to participate in a hearing before the board, they are a necessary party and this is sufficient to disqualify them from voting).

⁵⁴ *Rollins v. Connor*, 74 N.H. 456, 69 A.2d 777 (1909) (decision of Nashua common council was invalidated because a member of the council participated in a hearing investigating his election); *Winslow*, 125 N.H. 262, 480 A.2d 114.

Note that when a planning board is acting upon a request for a rezoning of a large area of the community or when the planning board is working on the master plan or engaged in similar activities, it is not in a situation where it is necessarily hearing evidence and arguments from parties whom it is bound to notify and may not, therefore, be acting in a judicial capacity. In such instances, board members will be subject to a lesser standard for disqualification.

Library References

4 Anderson, American Law of Zoning, §~ 23.21, 23.22 (1986)

Cross References

Conflicts of Interest, *see* Loughlin, 13 New Hampshire Practice: Local Government Law, ch. 17 (1990)